United States Senate
COMMITTEE ON FOREIGN RELATIONS
WASHINGTON, DC 20510–6225

July 7, 2004

Dear Colleague:

As part of my continuing effort to provide Senators with information on the Law of the Sea Convention, I thought it would be useful to share with you detailed responses to various questions that some have asked about the Convention. Attached for your reference is a paper that catalogs assertions that have been made about the Convention and responds to each of them. None of these assertions withstands scrutiny. As the Bush Administration, industry, environmental community, U.S. Commission on Oceans Policy, Pew Oceans Commission, and other experts on oceans law and policy have made clear, accession to the Convention is overwhelmingly in the interest of the United States.

Failure by the Senate to act on the Convention during the current session poses significant risks to our national interests. Such failure would increase the likelihood that Convention-based rights on which our military relies to protect our national security will be rolled back through amendments over which the United States will have no say. Efforts by Russia to claim rights to resources in vast swaths of the Arctic would proceed without the United States being able to participate fully in their consideration or to assert its own competing claims. The United States would also squander the opportunity to assume a position of leadership in international decisions about the uses of the oceans that will affect us greatly.

I urge you to join me in supporting prompt and favorable action on the Convention by the Senate.

Sincerely,

Richard G. Lugar
Chairman

RGL/mmk

Attachment

The Law of the Sea Convention: Assertions and Responses

Richard G. Lugar

This paper compiles a number of assertions have made about the Law of the Sea Convention and provides responses to each of them. None of these assertions withstands scrutiny.

1. Status of the 1994 Agreement

Assertion: It is unclear that the changes in the Convention's deep seabed mining regime sought by the United States have been made in a legally binding fashion. These changes were not made through a formal amendment to the Convention. Rather, they were made though an agreement separate from the Law of the Sea Convention – the 1994 Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea (the 1994 Agreement) – and this agreement has not been ratified by all states parties to the Convention.

Response:

The plain language of the 1994 Agreement, and the practice of the International Seabed Authority and of the parties to the Convention during the nearly ten years the Agreement has been in force, demonstrate that any doubts about the legal status of the 1994 Agreement are ill founded.

It is true that the 1994 Agreement is not an amendment to the Convention. At the time the changes to the Convention's deep seabed mining regime were being negotiated, the Convention had not yet entered into force, and it was important to the United States and other countries that the changes be made before its entry into force. To this end, they made these changes through a separate agreement modifying the Convention – the 1994 Agreement – an approach that had been used previously in treaty practice and that permitted the Convention to enter into force already modified. The understanding and intention of the parties was that this approach would produce the same substantive effect as if the changes had been made under the Convention's amendment provisions.

The 1994 Agreement specifically addresses its relationship to Part XI of the Convention and makes clear that its provisions supercede in the case of any conflict with Part XI. In this regard, Article 2, paragraph 1 of the 1994 states "The provisions of this Agreement and Part XI shall be interpreted and applied together as a single instrument. In the event of any inconsistency between this Agreement and Part XI, the provisions of this Agreement shall prevail."

The 1994 Agreement has been in force for nearly a decade and the practice of the International Seabed Authority confirms its legally binding force. The International

Seabed Authority's practice is particularly relevant because the principal purpose of the 1994 Agreement was to change the rules governing the Authority's operations. Throughout its entire period of existence, the Authority has operated under the 1994 Agreement, not under conflicting provisions in Part XI of the Convention. For example, Section 3 of the 1994 Agreement contains provisions governing election to and decision making within the Council of International Seabed Authority that are at variance with Section 161 of Part XI of the Convention. All elections to the Council, and decisions made by the Council, have been undertaken pursuant to the provisions of the 1994 Agreement rather than those of Part XI. Similarly, Section 9 of the 1994 Agreement creates a Finance Committee within the International Seabed Authority to address financial and budgetary matters of the Authority. No such body is created or contemplated by Part XI of the Convention, yet this Committee has been established and has functioned throughout the Authority's entire period of existence.

Nor do doubts about the binding nature of the 1994 Agreement find any support in the practice of states parties to the Convention. The United States was not alone in its insistence that the deep seabed mining provisions of the Convention be renegotiated. The vast bulk of the industrialized world shared our concerns about the deep seabed mining regime and joined us in declining to accede to the Convention in 1982. These countries, including all of the other members of the G-8, have since become parties to the Convention, and would not have done so if they had doubts about the effectiveness of the changes the 1994 Agreement made to the deep seabed mining regime. While it is true that there are some countries who acceded to the Convention prior to 1994, but who have not yet become parties to the 1994 Agreement, none of these countries has ever sought to apply the provisions of Part XI rather than those of the 1994 Agreement. These countries have participated in the work of the International Seabed Authority under the provisions of the 1994 Agreement for the past decade, and three of these countries – Brazil, Egypt, and Sudan – are currently members of the Authority's Council, and ran for their seats under procedures established by the 1994 Agreement.

The effect of the 1994 Agreement is further confirmed in a recent letter signed by all living former Legal Advisers to the U.S. Department of State, including those who served in the Reagan and George H.W. Bush Administrations. That letter states that the 1994 Agreement "has binding legal effect in its modification of the LOS Convention."[1] In sum, there is no serious doubt about the legal status of the 1994 Agreement.

2. Sufficiency of Changes Effected by the 1994 Agreement

Assertion: The 1994 Agreement did not satisfy all of President Reagan's concerns about the Convention. Moreover, U.S. security needs have changed significantly since the Convention was transmitted to the Senate in 1994 and the Convention's rules do not provide adequate protection for our current security needs.

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[1] Letter from Davis Robinson et. al. to Senator Richard Lugar, April 7, 2004.

Response:

A. President Reagan's concerns

President Reagan made his position on the Convention clear in a January 29, 1982 statement. He indicated that "while most provisions of the [then] draft convention are acceptable and consistent with U.S. interests, some major elements of the deep seabed mining regime are not acceptable." President Reagan's statement went on to specify his particular objections to the deep seabed mining regime, and his Administration sought changes to the Convention to address these concerns.

As representatives of the Bush Administration testified before the Foreign Relations Committee, the 1994 Agreement addressed each of President Reagan's stated concerns with the Convention. For reference, attached to this paper are President Reagan's January 29, 1982 statement on the Convention, a brief summary of the provisions of the 1994 Agreement addressing each of President Reagan's concerns, and a longer law review article by Professor Bernard Oxman setting out these issues in more detail.

Some have correctly observed that J. William Middendorf and Jeane Kirkpatrick, both of whom served in the Reagan Administration, testified before the Senate Armed Services Committee in opposition to the Convention. Neither of their statements identifies a single one of President Reagan's stated objections to the Convention that has not been addressed by the 1994 Agreement. While Ambassador Middendorf and Ambassador Kirkpatrick apparently believe that changes to the Convention beyond those sought by President Reagan would be desirable, their statements do nothing to suggest that the 1994 Agreement is insufficient on the ground that it failed to address President Reagan's stated concerns.

B. Changes in U.S. Security Requirements Since 1994

During the Foreign Relations Committee's hearings on the Convention, Mark Esper, Deputy Assistant Secretary of Defense for Negotiations Policy, made clear that the Bush Administration had carefully reviewed the Convention in light of current national security needs. Mr. Esper testified that

> [I]n the past year the Administration undertook a review of the Law of the Sea Convention to ensure that it continues to meet U.S. needs in the current national security environment. This dynamic environment also requires that the Convention allow for the flexibility we need to meet U.S. national security objectives and interests over the long term. Specifically, the Administration sought to ensure that, given this new strategic environment, the Law of the Sea Convention provides the United States with sufficient operational freedom and flexibility to pursue effectively U.S. goals in the global war on terrorism and our efforts in concert with other nations to halt the proliferation of weapons of mass

destruction. That review did not reveal particular problems affecting current U.S. operations.[2]

Other members of the Bush Administration's national security team have emphasized that the Convention will advance U.S. efforts to fight global terrorism. According to General Richard Myers, Chairman of the Joint Chiefs of Staff,

> The Convention remains a top national security priority. In today's fast changing world, it ensures the ability of the US Armed Forces to operate freely across the vast expanse of the world's oceans under the authority of widely recognized and accepted international law. It supports the War on Terrorism by providing much-needed stability and operational maneuver space, codifying essential navigational and overflight freedoms.[3]

Chief of Naval Operations Admiral Vern Clark has written

> Although the Convention was drafted over 20 years ago, the Convention supports U.S. efforts in the war on terrorism by providing important stability and codifying navigational and overflight freedoms, while leaving unaffected intelligence collection activities. Future threats will likely emerge in places and in ways that are not yet known. For these and other as yet unknown operational challenges, we must be able to take maximum advantage of the established navigational rights codified in the Law of the Sea Convention to get us to the fight rapidly.[4]

The considered view of our national security leadership is that the Convention is consistent with U.S. national security requirements, even as these have changed in the period since 1994, and that U.S. accession to the Convention will advance our ability to fight terrorism.

3. Revenue Sharing

Assertion: The Convention's provisions with respect to revenue sharing from deep seabed mining are contrary to U.S. interests. These provisions contemplate that U.S. companies that engage in deep seabed mining in areas beyond national jurisdiction will be required to share revenue generated from such activities with the International Seabed Authority.

Response:

It is understandable that such revenue sharing might be considered problematic if it created the possibility for undue financial burdens being placed on U.S. companies or for the International Seabed Authority to use funds generated from such revenue sharing

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[2] Testimony of Mark Esper before the Senate Foreign Relations Committee, October 21, 2003.
[3] Letter from General Richard Myers to Senator Richard Lugar, April 7, 2004.
[4] Letter from Admiral Vern Clark to Senator Richard Lugar, March 18, 2004.

in ways that were contrary to U.S. interests. The Convention contains protections to prevent either of these circumstances from occurring.

The parameters already established in the Convention for revenue sharing rules, and the ability of the United States to veto the adoption of any such rules, would prevent any such rules from imposing undue financial burdens on U.S. companies wishing to engage in deep seabed mining. Because deep seabed mining is not economically feasible at present, the International Seabed Authority has not had occasion to establish rules relating to revenue sharing. Under the Section 8, paragraph 1 of the 1994 Agreement, any such rules must be fair to contractors and involve payments "within the range of those prevailing in respect to land-based mining of the same or similar minerals in order to avoid giving deep seabed miners an artificial competitive advantage or imposing on them a competitive disadvantage."[5] Moreover, the adoption of any such rules would require a decision of the Council of the International Seabed Authority, which the United States would have the power to veto. Of course, if a U.S. company felt that the revenue sharing provisions established under the Convention were unduly burdensome, it would remain free to avoid them by declining to participate in deep seabed mining.

Similarly, under the Convention, the United States would have a veto over any decisions by the International Seabed Authority to distribute funds generated from revenue sharing in connection with deep seabed mining activities. This veto would allow the United States to prevent the use by the International Seabed Authority of funds in ways that are contrary to U.S. interests. The Convention does not give the United Nations any role or power with respect to the collection or spending of deep seabed mining revenue. All such funds would be administered by the International Seabed Authority, which is an independent international organization and not part of the United Nations.

Any concerns about the Convention's revenue sharing provisions must also be weighed against the available alternatives. The International Seabed Authority is the only internationally recognized regime for establishing rights to conduct deep seabed mining in areas beyond national jurisdiction. If the United States does not accede to the Convention, our companies will not be able to secure mining rights from the Authority unless they go through a foreign country that is party to the Convention. Nor will they have any realistic option of conducting such mining activities on their own because, absent an ability to secure recognized tenure to a mine site, they will be unable to obtain the financing and insurance necessary to conduct such activities. Thus, declining to accede to the Convention will not make it possible for U.S. companies to conduct deep seabed mining without being subject to revenue sharing. Rather, if the United States does not join the Convention, U.S. companies will not be able to conduct deep seabed mining on their own, and they would have to rely on foreign government sponsorships if they are to conduct such mining at all. Nor will a decision of the United States not to accede to the Convention prevent the International Seabed Authority from operating or from collecting and spending funds generated through revenue sharing. By staying outside the

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[5] 1994 Agreement, Section 8, paragraph 1(b).

Convention, the United States would lose any ability to influence the spending of such funds.

4. Technology Transfer

Assertion: The Convention could require transfers of technology to other Convention parties that would prejudice U.S. national security.

Response:

The Convention as modified by the 1994 Agreement contains no such requirement. Section 5 of the 1994 Agreement eliminated provisions of the Convention requiring that companies acquiring rights to conduct deep seabed mining agree to transfer mining technology to the International Seabed Authority and to developing countries. The Convention's remaining provisions addressing technology entail no obligation on any party to transfer any particular technology to the International Seabed Authority or to developing countries. Moreover, Article 302 of the Convention states clearly that "nothing in this Convention shall be deemed to require a State Party, in the fulfillment of its obligations under this Convention, to supply information the disclosure of which is contrary to the essential interests of its security." This provision ensures that the United States will never be required under the Convention to subordinate its national security interests in order to comply with its Convention obligations in this respect.

5. Dispute Resolution

Assertion: The Senate has historically not been inclined to accept compulsory dispute settlement, and the Convention would be the only treaty the United States is a party to that contains such provisions. In addition to suing the United States under the Convention directly, other countries could successfully request advisory opinions from the International Tribunal on the Law of the Sea in an effort to regulate, bind, and hamper the United States in all aspects of oceans activity.

Response:

It is simply false to assert that the United States is not a party to treaties that contain compulsory dispute resolution. In fact, the United States is party to more than 200 treaties that provide for mandatory dispute settlement at the request of one of the parties, including the 1995 UN Fish Stocks Agreement[6] which expressly incorporates the

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[6] Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management Of Straddling Fish Stocks and Highly Migratory Fish Stocks.

dispute settlement provisions of the Law of the Sea Convention. Indeed, if there is anything novel about the Convention's dispute resolution provisions, it is their provision for flexibility in ways that benefit U.S. interests.

The Convention provides such flexibility by giving the United States the right to choose the forum in which it will appear for most disputes. Consistent with the recommendation of the Bush Administration, the resolution reported by the Foreign Relations Committee would have the United States take advantage of the opportunity provided by the Convention to opt for ad hoc arbitration procedures rather than permanent international tribunals such as the International Court of Justice or the International Tribunal for the Law of the Sea. The ad hoc arbitration procedures give the United States a role in selecting the arbitrators who will decide cases.

The Convention provides further flexibility by giving the United States the right to exclude from dispute settlement several categories of disputes, including disputes related to military activities. Consistent with the recommendation of the Bush Administration, the resolution reported by the Foreign Relations Committee would have the United States decline to accept the Convention's dispute resolution procedures with respect to military activities. The United States is far from alone in relying on the ability to exclude military activities from the Convention's dispute resolution procedures. The United Kingdom, France, Russia, Norway, Australia, Canada, and Mexico are among the other parties to the Convention that have similarly invoked the Convention's military activities exclusion. Any tribunal decision that failed to give effect to this exclusion would be *ultra vires*.

Concerns about use of advisory opinions from the International Tribunal on the Law of the Sea to restrict U.S. oceans activities are also ill founded. The International Tribunal for the Law of the Sea lacks the authority to issue advisory opinions on matters of oceans law generally. Rather, the only advisory opinion jurisdiction provided for in the Convention is for the Tribunal's Seabed Disputes Chamber to issue advisory opinions on certain matters related to deep seabed mining at the request of the Assembly or the Council of the International Seabed Authority.[7] This narrow advisory opinion authority does not provide the Tribunal with any sort of backdoor power to bind the United States with respect to its ocean activities generally, even on the questionable assumption that the Tribunal would harbor such designs. Nor does the Convention give the Tribunal's interpretations of the Convention superior status to interpretations of ad hoc tribunals that will decide cases. Each tribunal under the Convention has only the authority to decide the case before it and not to bind other tribunals.

6. The Proliferation Security Initiative

Assertion: Acceding to the Convention would inhibit implementation of the Administration's Proliferation Security Initiative (PSI), designed to impede and stop shipments of weapons of mass destruction, delivery

[7] See Convention, art. 191.

> systems, and related materials flowing to and from states and non-state actors of proliferation concern.

Response:

There are several mutually reinforcing reasons why the Convention is consistent with, and indeed will strengthen, PSI.

First, acceding to the Law of the Sea Convention will not result in any change in the rules the United States is subject to relevant to PSI. As State Department Legal Adviser William Taft has explained[8], the rules contained in the Law of the Sea Convention applicable to boarding and searching foreign ships at sea are unchanged from the rules in this regard the United States is already subject to under the 1958 Geneva Conventions on the Law of the Sea, to which the United States is a party, and customary international law accepted by the United States.

Second, it has been U.S. policy since President Reagan's 1983 Statement of Oceans Policy to act in accordance with the Convention's provisions with respect to the traditional uses of the oceans, which include the Convention's provisions regarding the boarding and searching of foreign ships at sea. The elements of the U.S. Armed Forces carrying out PSI are thus already operating under the Convention's rules, and have been doing so for over 20 years.

Third, PSI's own rules provide that PSI activities will be consistent with the Convention. The Statement of Interdiction Principles pursuant to which PSI operates explicitly states that interdiction activities under PSI will be undertaken "consistent with national legal authorities and relevant international law and frameworks". As State Department Legal Adviser William Taft confirmed in testimony before the Foreign Relations Committee, the relevant international law framework for PSI includes the Law of the Sea Convention.

Fourth, all 15 countries that have joined with the United States in PSI are parties to the Law of the Sea Convention and accordingly observe its provisions.

Assertions that it is "illegal under the Convention" to take certain actions called for under PSI misunderstand both the Convention and PSI. As State Department Legal Adviser William Taft testified before the Senate Armed Services Committee,

> the Convention recognizes numerous legal bases for taking enforcement action against vessels and aircraft suspected of engaging in proliferation of weapons of mass destruction, for example, exclusive port and coastal State jurisdiction in internal waters and national airspace; coastal State jurisdiction in the territorial

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[8] Letter from William H. Taft, IV to Senator Richard Lugar, March 24, 2004.

sea and contiguous zone; exclusive flag State jurisdiction over vessels on the high seas (which the flag State may, either by general agreement in advance or approval in response to a specific request, waive in favor of other States); and universal jurisdiction over stateless vessels. Further, nothing in the Convention impairs the inherent right of individual or collective self-defense (a point which is reaffirmed in the proposed Resolution of Advice and Consent).[9]

When the PSI Statement of Interdiction Principles says that actions pursuant to PSI will be undertaken "consistent with national legal authorities and relevant international law and frameworks", it envisions reliance on these bases of legal authority, among others, that are fully consistent with the Convention. The United States has never asserted the right or the intention to take actions under PSI that would violate the Convention. Some have noted that Article 23 of the Convention recognizes the right of nuclear powered ships and ships carrying nuclear or other inherently dangerous substances to exercise rights of innocent passage. This is a provision sought by the United States to prevent interference by other states with U.S. nuclear powered or nuclear armed military vessels, and thus is very much in our interest. It will not interfere with the exercise of the authorities mentioned above to implement PSI.

Representatives of our armed forces who are responsible for carrying out PSI have stated that acceding to the Law of the Sea Convention will strengthen the ability of the United States to pursue PSI.

Admiral Michael Mullen, Vice Chief of Naval Operations, testified before the Foreign Relations Committee that being party to the Convention "would greatly strengthen [the Navy's] ability to support the objectives" of PSI by reinforcing and codifying freedom of navigation rights on which the Navy depends for operational mobility. In a similar vein, Deputy Assistant Secretary of Defense for Negotiations Policy Mark Esper testified that "as a party to the Law of the Sea Convention, the United States will have another avenue through which to achieve consensus proscribing the maritime trafficking of weapons of mass destruction, their delivery systems, and related materials to and from states of concern and terrorists."

For these reasons, acceding to the Convention will actually help the United States pursue PSI successfully.

7. Intelligence Activities

Assertion: Acceding to the Convention would hamper U.S. intelligence collection activities.

Response:

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[9] Testimony of William H. Taft, IV before the Senate Armed Services Committee, April 8, 2004.

The intelligence community has made clear that acceding to the Convention would have no adverse effect on U.S. intelligence activities. In unclassified testimony before the Senate Select Committee on Intelligence, State Department Legal Adviser William Taft stated that

> The Convention does not prohibit or regulate intelligence activities. And disputes concerning military activities, including intelligence activities, would not be subject to dispute resolution under the Convention as a matter of law and U.S. policy. As such, joining the Convention would not affect the conduct of intelligence activities in any way, while supporting U.S. national security, economic, and environmental interests.[10]

Charles Allen, Assistant Director of Central Intelligence for Collection and Rear Admiral Richard B. Porterfield, Director of Naval Intelligence, provided classified testimony to the Senate Select Committee on Intelligence on intelligence issues related to the Convention, and these same issues were the subject of a 1995 classified legal analysis of the Convention prepared by the Department of Defense at the request of the Senate Select Committee on Intelligence. Members of the Senate are urged to review these materials.

This record establishes clearly that accession to the Convention will have no adverse effect on U.S. intelligence activities. This view is confirmed by the conclusions of Chairman of the Joint Chiefs of Staff, General Richard Myers, and Vice Chief of Naval Operations, Admiral Vern Clark, both of whom have indicated in writing that U.S. accession to the Convention would leave U.S. intelligence activities unaffected.[11]

Richard G. Lugar
Chairman

Attachments:

1. Statement of President Reagan and White House Fact Sheet, January 29, 1982
2. Fact Sheet on Deep Seabed Mining and the International Seabed Authority
3. Bernard Oxman, *The 1994 Agreement and the Convention*, 88 AJIL 687 (1994).

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[10] Statement of William H. Taft, IV before the Senate Select Committee on Intelligence, June 8 2004.

[11] Letter from General Richard Myers to Senator Richard Lugar, April 7, 2004; Letter from Admiral Vern Clark to Senator Richard Lugar, March 18, 2004.

U.S. Policy and the Law of the Sea

Following are a statement by President Reagan announcing the U.S. decision to return to the Law of the Sea negotiations and a White House Fact Sheet outlining U.S. policy, both of January 29.

PRESIDENT'S STATEMENT[1]

The world's oceans are vital to the United States and other nations in diverse ways. They represent waterways and airways essential to preserving the peace and to trade and commerce. They are major sources for meeting increasing world food and energy demands and promise further resource potential. They are a frontier for expanding scientific research and knowledge; a fundamental part of the global environmental balance; and a great source of beauty, awe, and pleasure for mankind.

Developing international agreement for this vast ocean space, covering over half of the earth's surface, has been a major challenge confronting the international community. Since 1973, scores of nations have been actively engaged in the arduous task of developing a comprehensive treaty for the world's oceans at the Third U.N. Conference on the Law of the Sea. The United States has been a major participant in this process.

Serious questions had been raised in the United States about parts of the draft convention and, last March, I announced that my Administration would undertake a thorough review of the current draft and the degree to which it met U.S. interests in the navigation, overflight, fisheries, environmental, deep seabed mining, and other areas covered by that convention. We recognize that the last two sessions of the conference have been difficult, pending the completion of our review. At the same time, we consider it important that a Law of the Sea treaty be such that the United States can join in and support it. Our review has concluded that while most provisions of the draft convention are acceptable and consistent with U.S. interests, some major elements of the deep seabed mining regime are not acceptable.

I am announcing today that the United States will return to those negotiations and work with other countries to achieve an acceptable treaty. In the deep seabed mining area, we will seek changes necessary to correct those unacceptable elements and to achieve the goal of a treaty that will:

- Not deter development of any deep seabed mineral resources to meet national and world demand;
- Assure national access to these resources by current and future qualified entities to enhance U.S. security of supply, to avoid monopolization of the resources by the operating arm of the international authority, and to promote the economic development of the resources;
- Provide a decisionmaking role in the deep seabed regime that fairly reflects and effectively protects the political and economic interests and financial contributions of participating states;
- Not allow for amendments to come into force without approval of the participating states, including, in our case, the advice and consent of the Senate;
- Not set other undesirable precedents for international organizations; and
- Be likely to receive the advice and consent of the Senate. In this regard, the convention should not contain provisions for the mandatory transfer of private technology and participation by and funding for national liberation movements.

The United States remains committed to the multilateral treaty process for reaching agreement on law of the sea. If working together at the conference we can find ways to fulfill these key objectives, my Administration will support ratification.

I have instructed the Secretary of State and my Special Representative for the Law of the Sea Conference [James L. Malone, Chairman of the U.S. delegation], in coordination with other responsible agencies, to embark immediately on the necessary consultations with other countries and to undertake further preparations for our participation in the conference.

WHITE HOUSE FACT SHEET[1]

Today the President announced his decision that the United States will return to the negotiations at the Third U.N. Conference on the Law of the Sea and work with other countries to achieve an acceptable treaty for the world's oceans. This follows a comprehensive interagency review of U.S. Law of the Sea objectives and interests as they relate to the current draft convention.

Preparations for the Third U.N. Conference on the Law of the Sea began in 1969. The first substantive session of the conference was convened in Caracas, Venezuela, in 1974. Ten sessions of the conference have been held since then to develop a consensus agreement on provisions covering the full range of ocean interests. These include:

- Exploration and exploitation of deep seabed mineral resources;
- Extent and nature of coastal state jurisdiction over living resources;
- Extent of coastal state jurisdiction over the resources of the continental margin;
- Limits of the territorial sea;
- Navigation and overflight rights on the high seas, in territorial seas, in straits, and in archipelagoes;
- Delimitation of boundaries between opposite and adjacent states;
- The rights of landlocked and geographically disadvantaged states;
- Protection of the marine environment;
- Freedom on marine scientific research; and
- Peaceful settlement of disputes.

Over 150 nations have participated in this effort. By 1980, the conference had reached agreement on all but four outstanding issues: the delimitation of the outer edge of the continental margin, participation of regional organizations in the treaty, establishment of a preparatory commission, and grandfather rights for existing deep seabed miners. Most participants expected that the negotiations would conclude in 1981.

Serious concerns had been raised within the United States, however, specifically with respect to the deep seabed mining provisions of the draft convention. The proposed treaty has some unacceptable elements. Consequently, on March 2, 1981, the Administration announced that it was initiating a comprehensive review of U.S. law of the sea policy.

The United States sought to insure that there was sufficient time for the review of the proposed draft convention before negotiations were concluded. The conference proceeded with technical drafting work and discussion of several outstanding issues during a 5-week session in March and April 1981. In August 1981, the conference reconvened in Geneva for 5 weeks during which the United States aired a series of substantive concerns with respect to the deep seabed provisions of the draft convention. The United States sought to elicit

candid reactions to areas of its concern and to explore the kinds of solutions that could reasonably be expected to result from further negotiations. The next session of the conference begins in early March.

U.S. concerns about the draft convention center on those issues of access, development decisionmaking, and other provisions noted in the President's statement. Particular elements of the deep seabed provisions that give rise to U.S. concerns include:

- Policymaking in the seabed authority would be carried out by a one-nation, one-vote assembly;
- The executive council which would make the day-to-day decisions affecting access of U.S. miners to deep seabed minerals would not have permanent or guaranteed representation by the United States, and the United States would not have influence on the council commensurate with its economic and political interests;
- A review conference would have the power to impose treaty amendments on the United States without its consent;
- The treaty would impose artificial limitations on seabed mineral production;
- The treaty would give substantial competitive advantages to a supranational mining company—the Enterprise;
- Private deep seabed miners would be subject to a mandatory requirement for the transfer of technology to the Enterprise and to developing countries;
- The new international organization would have discretion to interfere unreasonably with the conduct of mining operations, and it could impose potentially burdensome regulations on an infant industry; and
- The treaty would impose large financial burdens on industrialized countries whose nationals are engaged in deep seabed mining and financial terms and conditions which would significantly increase the costs of mineral production.

The deep seabed offers a potentially important alternative source of minerals. While current world demand and metals markets do not justify commercial-scale development at this time, multinational consortia have invested substantial amounts to develop technology and to prospect. When economic factors become favorable, deep seabed mining is likely to be an important undertaking.

[1]Text from Weekly Compilation of Presidential Documents of Feb. 1, 1982.

Republic of Nauru

PEOPLE

The population includes more than 4,000 indigenous Nauruans, nearly 2,000 workers from other Pacific islands, and 1,500 Europeans and Chinese. The inhabitants live in small settlements scattered throughout the island. Nauruans are a mixture of the three basic Pacific ethnic groups: Melanesian, Micronesian, and Polynesian. Through centuries of intermarriage, a homogeneous people evolved. Their language, a fusion of elements from the Gilbert, Caroline, Marshall, and Solomon Islands, is distinct from all other Pacific languages. Most of the people speak English, and all understand it. All Nauruans are professed Christians.

Education is free and compulsory for Nauruan children between ages 6 and 16 and between 6 and 15 for non-Nauruan children. In addition, numerous government scholarships are given for students to attend boarding schools and universities abroad, principally in Australia. Literacy is virtually universal.

In the past 100 years, the existence of the Nauruans as a people has been threatened on several occasions. Tribal disputes in the 1870s reduced the population to fewer than 1,000 after 10 years of strife. An influenza epidemic in 1919 reduced the population by one-third in a few weeks. During World War II, the Nauruan community again lost two-thirds of its population when the Japanese deported many Nauruans to the Caroline Islands to build airstrips. Since the war, however, the Nauruan population has increased from 1,300 to 7,700.

GEOGRAPHY

Nauru, an oval island in the west-central Pacific Ocean, lies 53 kilometers (33 mi.) south of the Equator, 3,520 kilometers (2,200 mi.) northeast of Sydney, Australia, and 3,912 kilometers (2,445 mi.) southwest of Honolulu, Hawaii. The island is about 19 kilometers (12 mi.) in circumference and contains 21 square kilometers (8 sq. mi.) of land.

Nauru is one of the three great phosphate-rock islands of the Pacific (the other two are Ocean Island, part of the Gilbert Islands, and Makatea Island in French Polynesia). The coast has a sandy beach rising gradually to form a fertile section several hundred meters wide encircling the island. A coral reef reaches 60 meters (200 ft.) above sea level on the inner side of the fertile area. An extensive plateau bearing high-grade phosphate is above the cliff.

The climate is hot but not unpleasant. Temperatures range between 24°C (76°F) and 33°C (93°F) and the humidity, between 70% and 80%. The average annual rainfall is 45 centimeters (18 in.), but it fluctuates greatly. For example, in 1950 only 30 centimeters (12 in.) of rain fell, but in 1930 and 1940, rainfall measured more than 457 centimeters (180 in.).

Nauru has no capital city; Parliament House and government houses are on the coast and opposite the airport in Yaren District.

HISTORY

Little is known of Nauru's early history. The origin of the inhabitants and the circumstances of their coming are unknown, but they are believed to be castaways who drifted there from some other island.

The island was discovered in 1798 by John Fearn, captain of the British whaling ship "Hunter," on a voyage from New Zealand to the China Sea. He noted that the attractive island was "extremely populous" with many houses and named it Pleasant Island.

The isolated island remained free of European contact for much longer than other Pacific islands. During the 19th century, however, European traders and beachcombers established themselves there. The Europeans were useful to the Nauruans as intermediaries with visiting ships; however, the Europeans obtained firearms and alcohol for the islanders, exacerbating their intertribal warfare.

Pleasant Island came under German control in 1881 under an Anglo-German Convention and reverted to its native name, Nauru. By 1881, when the Germans first sent an administrator to the island, continual warring between the 12 tribes had reduced the population from about 1,400 in 1842 to little more than 900. Alcohol was banned and arms and ammunition confiscated in an effort to restore order. With the arrival in 1899 of the first missionaries, Christianity

Fact Sheet on Deep Seabed Mining and the International Seabed Authority

The Law of the Sea Convention creates an organization called the International Seabed Authority (ISA) to administer deep seabed mining in areas beyond national jurisdiction (generally more than 200 nautical miles from the coastline of any state). The ISA's role is limited to deep seabed mining for mineral resources in these areas. It has no authority over any other issues related to the uses of the oceans in areas beyond national jurisdiction, and the Convention provides specific protections for other uses important to the United States such as navigation and overflight.

There has never been any serious dispute over the need for an international regime to administer deep seabed mining. The United States has never claimed sovereign control over seabed resources beyond its national jurisdiction and would not recognize such claims by other countries. Absent an internationally accepted regime governing these resources, companies will be unwilling to make the investments necessary to conduct mining because they will have no way of establishing certain legal title to the sites they wish to mine and the resources found there. At present and for the foreseeable future, deep seabed mining in areas beyond national jurisdiction is economically infeasible due to the costs associated with mining at such depths and the relatively low market prices for deep seabed minerals.

President Reagan accepted the concept of an international regime for deep seabed mining, but had a number of specific objections to the regime established by the Convention when it was initially concluded in 1982. Those objections were set out in a January 29, 1982 statement and accompanying fact sheet issued by the White House, which are attached for reference.

The 1994 renegotiation of the deep seabed mining regime addressed each of President Reagan's objections. Reagan's objections and the manner in which they were resolved in the 1994 renegotiation are summarized below. A 1994 article by Professor Bernard Oxman addressing these issues in greater detail is attached for further reference.

Objection: The Convention provides for policymaking in the ISA to be carried out by a one-nation, one vote assembly; the ISA executive council, which would make day-to-day decisions affecting access of U.S. miners to deep seabed minerals, would not have permanent or guaranteed representation by the United States, and the United States would not have influence in the council commensurate with its political and economic interests.

Changes made to meet objection:

- New rules shift primary ISA policymaking authority from the ISA Assembly to the ISA Council. Under the new rules, all Assembly policy decisions must be based on recommendations by the Council, which the Assembly may accept or reject, but may not modify.

- New rules give the United States a permanent seat on the ISA Council, now the ISA's main decision making body.

- New rules allow the United States to veto the ISA Council's adoption of any rules, regulations, and procedures relating to the deep seabed mining regime, any decisions having financial or budgetary implications (including those relating to distribution of ISA revenues), and any decisions on proposed amendments to the regime.

- New rules allow the United States acting together with two other countries that are major consumers of minerals to veto all other substantive decisions.

Objection: The Convention mandates a Review Conference, to take place 15 years after the first approved commercial production, which would have the power to impose treaty amendments on the United States without its consent.

Changes made to meet objection:

- Mandatory Review Conference provisions eliminated.

- New rules permit the United States to veto any proposed amendment to the deep seabed mining regime.

Objection: The Convention would give substantial competitive advantages to a supranational mining enterprise and would subject private deep seabed miners to a mandatory requirement for the transfer of technology to the enterprise and to developing countries.

Changes made to meet objection:

- New rules prevent ISA mining enterprise from becoming operational absent decision by ISA Council, which could be vetoed by joint decision of countries with major deep seabed mining investments.

- Elimination of requirements for industrialized states to fund ISA mining enterprise and to transfer technology to it and to developing countries. New rules provide that deep seabed mining technology should be acquired on the open market under normal commercial terms.

- New rules make potential ISA mining enterprise subject to the same performance obligations as apply to private contractors and require it to operate on sound commercial principles and without subsidies.

Objection: The Convention would impose artificial limitations on seabed mineral production, would give the ISA authority to interfere unreasonably with the conduct of mining operations and to impose burdensome regulations on an infant industry and discriminate against U.S. companies, and would impose large financial burdens on industrialized countries whose nationals are engaged in deep seabed mining and financial terms and conditions that would significantly increase the costs of mineral production.

Changes made to meet objection:

- Production limitations and controls eliminated. New rules permit production without artificial limit and prevent subsidization of mining activities or restriction of market access inconsistent with GATT/WTO rules.

- New rules allow the United States to veto the ISA Council's adoption of any rules, regulations, and procedures relating to the deep seabed mining regime.

- Elimination of rules providing for subjective and political considerations in awarding of mining rights that could have been used to discriminate against U.S. companies. New rules provide for awards on first-come, first-served basis to qualified applicants meeting objective criteria.

- Elimination of financial terms for mining contracts requiring miners to pay $1 million annual fee beginning on date mining rights are granted. New rules defer to the future decisions about financial terms and provide that such terms must be commercially reasonable and comparable to those prevailing in similar land-based mining contracts.

The 1994 Agreement and the Convention

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LAW OF THE SEA FORUM: THE 1994 AGREEMENT ON IMPLEMENTATION OF THE SEABED PROVISIONS OF THE CONVENTION ON THE LAW OF THE SEA

THE 1994 AGREEMENT AND THE CONVENTION

In June 1994, some twelve years after the conclusion of the Third UN Conference on the Law of the Sea, the UN Secretary-General reported to the General Assembly that informal consultations had led to agreements that appeared to have removed the obstacles to general adherence to the 1982 UN Convention on the Law of the Sea.[1]

The history of the Convention since 1982 is widely known. In 1982 President Reagan declared that the United States would not sign the Convention because of objections to Part XI, the proposed regime for deep seabed mining. Most other industrialized states signed but withheld ratification while work proceeded in the Preparatory Commission. Most developing states signed the Convention and the number of ratifications increased slowly.

In July 1990, UN Secretary-General Javier Pérez de Cuéllar initiated informal consultations to attempt to meet the objections of the industrialized states. His successor, Boutros Boutros-Ghali, continued those consultations and saw them to conclusion. A new sense of urgency was introduced into the consultations in 1993 when it became apparent that the Convention would receive the number of ratifications necessary for entry into force before the end of 1994.

As reported by the Secretary-General, the consultations resulted in:

> — a draft "Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982"; and
>
> — a draft resolution by which the UN General Assembly would adopt the Agreement and urge states to adhere to it and to the Convention.[2]

The resolution was adopted by the General Assembly at a resumed forty-eighth session on July 28, 1994, by a vote of 121 in favor, none against, and 7 abstentions.[3] The Agreement was opened for signature the next day. Over fifty states have already signed the Agreement, including the United States and virtually all other industrialized states.

THE AGREEMENT, THE CONVENTION AND U.S. POLICY

The 1994 Agreement provides, in Article 2, that it is to be interpreted and applied together with Part XI of the Convention as a single instrument; in the

[1] United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, UN Doc. A/CONF.62/122 (1982), *reprinted in* UNITED NATIONS, OFFICIAL TEXT OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA WITH ANNEXES AND INDEX, UN Sales No. E.83.V.5 (1983) [hereinafter LOS Convention].

[2] UN Doc. A/48/950 (1994).

[3] GA Res. 48/263 (July 28, 1994). The new Agreement is annexed to the resolution, and is hereinafter cited as the Agreement. Russia abstained in the vote to adopt the resolution and Agreement on the grounds that the new provisions regarding pioneer investors discriminate in favor of the United States. The same objection to different provisions was proffered to explain the Soviet abstention in the vote in 1982 on adoption of the Convention by the Law of the Sea Conference.

event of inconsistency between them, the Agreement will prevail. It may take some time before states that have not yet ratified the Convention become party to the Convention and the 1994 Agreement.[4] More than sixty states, however, have already ratified the Convention, which enters into force for them on November 16, 1994; it would have been unrealistic to expect that before that date all of them would become party to the new Agreement as well. The Agreement therefore contains liberal terms for its provisional application by all, and affords states several years to become party to both the Agreement and the Convention.[5] With a large number of states, including industrial states, accepting provisional application, one may expect that Part XI will be implemented from the outset in accordance with the new Agreement and with representative participation in decision-making organs.

The purpose of the 1994 Agreement is to enhance the prospects for widespread ratification of the Convention by responding to problems with the deep seabed mining regime in Part XI, particularly those that troubled industrial states, including the United States. The Agreement is designed also to respond to developments in the decade since Part XI was completed, specifically "the growing concern for the global environment," and "political and economic changes, including in particular a growing reliance on market principles."

It may be instructive to consider how the 1994 Agreement responds to the problems identified and the concerns expressed by the United States when it sought, without success, to change Part XI in 1982.

U.S. policy regarding the 1982 Convention, as enunciated by the Reagan administration,[6] may be summarized as follows. "While most provisions of the draft convention are acceptable and consistent with U.S. interests, some major elements of the deep seabed mining regime are not acceptable."[7] The United States "has a strong interest in an effective and fair Law of the Sea treaty which includes a viable seabed mining regime."[8] It was "not seeking to change the basic structure

[4] Article 4 of the Agreement provides:

> 1. After the adoption of this Agreement, any instrument of ratification or formal confirmation of or accession to the Convention shall also represent consent to be bound by this Agreement.
>
> 2. No State or entity may establish its consent to be bound by this Agreement unless it has previously established or establishes at the same time its consent to be bound by the Convention.

Paragraph 5 of the resolution adopting the Agreement contains essentially the same language.

[5] Pursuant to Article 7, pending entry into force of the Agreement, and absent written notification to the contrary by the state concerned, states that either consented to adoption of the Agreement in the General Assembly, or sign or adhere to the Agreement, or consent in writing to its provisional application "shall apply this Agreement provisionally in accordance with their national laws and regulations, with effect from 16 November 1994" or such later date as this obligation is applicable to them. Should the Agreement enter into force before November 16, 1998, provision is made for grace periods extending up to that date for states that have not completed the ratification process. Agreement, annex, sec. 1, para. 12.

[6] The Reagan administration's statements quoted hereinafter appear in the following documents: Statement by the President, *U.S. Policy and the Law of the Sea*, Jan. 29, 1982, DEPT. ST. BULL., Mar. 1982, at 54; White House Fact Sheet [accompanying Presidential Statement], Jan. 29, 1982, *id.* at 54–55; Statement by Ambassador James L. Malone, Special Representative of the President, before the House Merchant Marine and Fisheries Committee, Feb. 23, 1982, *id.*, May 1982, at 61–63; Statement by the President, July 9, 1982, *id.*, Aug. 1982, at 71; Statement by Ambassador James L. Malone, Special Representative of the President, before the House Foreign Affairs Committee, Aug. 12, 1982, *id.*, Oct. 1982, at 48–50.

[7] Statement by the President, Jan. 29, 1982, note 6 *supra*.

[8] Statement by the Special Representative of the President, Feb. 23, 1982, note 6 *supra*.

of the treaty" or "to destroy the system" but "to make it work for the benefit of all nations to enhance, not resist, seabed resource development."[9] If negotiations could fulfill six key objectives with respect to the deep seabed mining regime, the "Administration will support ratification" of the Convention.[10] It was the administration's "judgment that, if the President's objectives as outlined are satisfied, the Senate would approve the Law of the Sea treaty."[11]

The six objectives identified by President Reagan required a deep seabed mining regime that would:

> • Not deter development of any deep seabed mineral resources to meet national and world demand;
> • Assure national access to these resources by current and future qualified entities to enhance U.S. security of supply, to avoid monopolization of the resources by the operating arm of the international authority, and to promote the economic development of the resources;
> • Provide a decisionmaking role in the deep seabed regime that fairly reflects and effectively protects the political and economic interests and financial contributions of participating states;
> • Not allow for amendments to come into force without approval of the participating states, including, in our case, the advice and consent of the Senate;
> • Not set other undesirable precedents for international organizations; and
> • Be likely to receive the advice and consent of the Senate. In this regard, the convention should not contain provisions for the mandatory transfer of private technology and participation by and funding for national liberation movements.[12]

How the 1994 Agreement responds to U.S. objections and U.S. requirements may be considered under several headings.

Decision Making

Like many international organizations, the International Sea-Bed Authority established by the Convention will have an Assembly in which all parties are represented, a Council of limited membership, and specialized elected organs also of limited membership.

1982 text: While all specific regulatory powers with regard to deep seabed mining are reposed exclusively or concurrently in the Council, Article 160 gives the Assembly "the power to establish general policies."

Problem: "Policymaking in the seabed authority would be carried out by a one-nation, one-vote assembly."[13]

Response: The 1994 Agreement qualifies the general policy-making powers of the Assembly by requiring the collaboration of the Council. It also provides: "Decisions of the Assembly on any matter for which the Council also has competence or on any administrative, budgetary or financial matter shall be based on the

[9] Statement by the Special Representative of the President, Aug. 12, 1982, note 6 *supra.*

[10] Statement by the President, Jan. 29, 1982, note 6 *supra.*

[11] Statement by the Special Representative of the President, Feb. 23, 1982, note 6 *supra.*

[12] Statement by the President, Jan. 29, 1982, note 6 *supra.* The White House Fact Sheet accompanying the President's announcement of the six objectives in January 1982, and congressional testimony by the President's special representative later that year, identified the elements in the Part XI regime that related to one or more of those objectives. Note 6 *supra.*

[13] White House Fact Sheet, Jan. 29, 1982, note 6 *supra.*

recommendations of the Council."[14] The Assembly may either approve the recommendations or return them.[15]

Problem: "The executive council which would make the day-to-day decisions affecting access of U.S. miners to deep seabed minerals would not have permanent or guaranteed representation by the United States."[16]

Response: The new Agreement guarantees a seat on the Council for "the State, on the date of entry into force of the Convention, having the largest economy in terms of gross domestic product."[17] That state is the United States.

1982 text: Consensus on the thirty-six-member Council is required for such matters as proposing treaty amendments; adopting rules, regulations and procedures; and distributing financial benefits and economic adjustment assistance.[18] Other substantive Council decisions require either a two-thirds or three-quarters vote.[19]

Problem: The "United States would not have influence on the council commensurate with its economic and political interests."[20] "The decisionmaking system should provide that, on issues of highest importance to a nation, that nation will have affirmative influence on the outcome. Conversely, nations with major economic interests should be secure in the knowledge that they can prevent decisions adverse to their interests."[21]

Response: The new Agreement establishes "chambers" of states with particular interests.[22] Two four-member chambers of the Council are likely to be effectively controlled by major industrial states, including the United States (which is guaranteed a seat in one of those chambers).[23] The Agreement provides that "decisions on questions of substance, except where the Convention provides for decisions by consensus in the Council, shall be taken by a two-thirds majority of members present and voting, provided that such decisions are not opposed by a majority in any one of the chambers."[24] Any three states in either four-member chamber may therefore block a substantive decision for which consensus is not required.

The Agreement further specifies: "Decisions by the Assembly or the Council having financial or budgetary implications shall be based on the recommendations of the Finance Committee."[25] The United States and other major contributors to the administrative budget are guaranteed seats on the Finance Committee, and the committee functions by consensus.[26]

This approach to voting enables interested states (including the United States) to block undesirable decisions. Because blocking power encourages negotiation of

[14] Agreement, annex, sec. 3, paras. 1, 4.

[15] *Id.*, para. 4. Rules, regulations and procedures adopted by the Council on prospecting, exploration and exploitation and the financial and internal management of the Authority remain in effect provisionally until approved by the Assembly or amended by the Council in light of the Assembly's views. LOS Convention, Art. 162, para. 2(o)(ii).

[16] White House Fact Sheet, Jan. 29, 1982, note 6 *supra*.

[17] Agreement, annex, sec. 3, para. 15(a).

[18] LOS Convention, Art. 161, para. 8(d).

[19] *Id.*, para. 8(b), (c).

[20] White House Fact Sheet, Jan. 29, 1982, note 6 *supra*.

[21] Statement by the Special Representative of the President, Feb. 23, 1982, note 6 *supra*.

[22] Agreement, annex, sec. 3, paras. 9, 10, 15.

[23] *Id.*, paras. 10, 15(a), (b). Major land-based producers and exporters of relevant minerals, such as Canada and Chile, would be represented in their own four-member chamber. *Id.*, para. 15(c).

[24] *Id.*, para. 5.

[25] *Id.*, para. 7.

[26] *Id.*, sec. 9, paras. 3, 8.

decisions desired by and acceptable to the states principally affected, it enhances affirmative as well as negative influence.

Production Limitation

Problem: "The United States believes that its interests . . . will best be served by developing the resources of the deep seabed as market conditions warrant. We have a consumer-oriented philosophy. The draft treaty, in our judgment, reflects a protectionist bias which would deter the development of deep seabed mineral resources."[27] Specifically, the "treaty would impose artificial limitations on seabed mineral production"[28] and "would permit discretionary and discriminatory decisions by the Authority if there is competition for limited production allocations."[29] The production ceiling is undesirable as a matter of principle and precedent,[30] and the process for allocating production authorizations is a significant source of uncertainty and discriminatory treatment impeding guaranteed access to minerals by qualified miners.[31]

Response: The new Agreement specifies that the provisions regarding the production ceiling, production limitations, participation in commodity agreements, production authorizations and selection among applicants "shall not apply."[32] In their place, the Agreement incorporates the market-oriented GATT restrictions on subsidies.[33] It prohibits "discrimination between minerals derived from the [deep seabeds] and from other sources,"[34] and specifies that the rates of payments by miners to the Authority "shall be within the range of those prevailing in respect of land-based mining of the same or similar minerals in order to avoid giving deep seabed miners an artificial competitive advantage or imposing on them a competitive disadvantage."[35]

Technology Transfer

Problem: "Private deep seabed miners would be subject to a mandatory requirement for the transfer of technology to the Enterprise and to developing countries."[36] This provision was considered burdensome, prejudicial to intellectual property rights, and objectionable as a matter of principle and precedent.[37]

Response: The new Agreement declares that the provisions on mandatory transfer of technology "shall not apply."[38] It substitutes a general duty of cooperation by sponsoring states to facilitate the acquisition of deep seabed mining technology, "consistent with the effective protection of intellectual property rights," if the Enterprise (the operating arm of the Sea-Bed Authority) or developing countries are unable to obtain such technology on the open market or through joint-venture arrangements.[39]

[27] Statement by the Special Representative of the President, Feb. 23, 1982, note 6 *supra*.
[28] White House Fact Sheet, Jan. 29, 1982, note 6 *supra*.
[29] Statement by the Special Representative of the President, Aug. 12, 1982, note 6 *supra*.
[30] Statement by the Special Representative of the President, Feb. 23, 1982, note 6 *supra*.
[31] Statement by the Special Representative of the President, Aug. 12, 1982, note 6 *supra*.
[32] Agreement, annex, sec. 6, para. 7. [33] *Id.*, paras. 1(b), (c), 3.
[34] *Id.*, para. 1(d).
[35] Agreement, annex, sec. 8, para. 1(b).
[36] White House Fact Sheet, Jan. 29, 1982, note 6 *supra*.
[37] Statement by the Special Representative of the President, Aug. 12, 1982, note 6 *supra*.
[38] Agreement, annex, sec. 5, para. 2. [39] *Id.*, para. 1(b).

Access

Problem: "The draft treaty provides no assurance that qualified private applicants sponsored by the U.S. Government will be awarded contracts. It is our strong view that all qualified applicants should be granted contracts and that the decision whether to grant a contract should be tied exclusively to the question of whether an applicant has satisfied objective qualification standards."[40]

Response: The new Agreement eliminates the provisions for choice among qualified applicants.[41] Access will be on a first-come, first-served basis. The qualification standards for mining applicants are to be set forth in rules, regulations and procedures adopted by the Council by consensus and "shall relate to the financial and technical capabilities of the applicant and his performance under any previous contracts."[42] If the applicant is qualified; if the application fee is paid; if procedural and environmental requirements are met; if the area applied for is not the subject of a prior contract or application; and if the sponsoring state would not thereby exceed maximum limits specified in the Convention, "the Authority shall approve" the application.[43] Its failure to do so will be subject to arbitration or adjudication.[44]

The new Agreement contains special voting rules that facilitate a decision to approve an application to explore or exploit minerals. In the Legal and Technical Commission, only a simple majority is required for recommending approval.[45] When that recommendation reaches the Council, the application is deemed approved unless disapproved within a prescribed period (normally sixty days) by the same vote required for substantive decisions.[46] Thus, any three industrial states in a four-member chamber may prevent disapproval.

The new Agreement accords important "grandfather" rights to the U.S. consortia that already have made investments under the U.S. Deep Seabed Hard Mineral Resources Act.[47] They are deemed to have met the necessary financial and technical qualifications if the U.S. Government, as the sponsoring state, certifies that they have made the necessary expenditures.[48] They are also entitled to arrangements "similar to and no less favourable than" those accorded investors of other countries that registered as pioneers with the Preparatory Commission prior to entry into force of the Convention.[49]

Problem: U.S. objectives "would not be satisfied if minerals other than manganese nodules could be developed only after a decision was taken to promulgate rules and regulations to allow the exploitation of such minerals."[50]

Response: The new Agreement requires the Council of the Authority to adopt necessary rules, regulations and procedures within two years of a request by a state whose national intends to apply for the right to exploit a mine site.[51] This

[40] Statement by the Special Representative of the President, Feb. 23, 1982, note 6 *supra*.
[41] Agreement, annex, sec. 6, para. 7.
[42] LOS Convention, Art. 161, para. 8(d), Art. 162, para. 2(o)(ii); Ann. III, Art. 4, paras. 1, 2, Art. 17, para. 1(b)(xiv).
[43] LOS Convention, Art. 162, para. 2(x); Ann. III, Art. 6, paras. 1–4, Art. 10; Agreement, annex, sec. 1, paras. 7, 13.
[44] LOS Convention, Arts. 187, 188, 286–88, 290; Agreement, annex, sec. 3, para. 12.
[45] Agreement, annex, sec. 3, para. 13; *see* LOS Convention, Arts. 163, 165.
[46] Agreement, annex, sec. 3, para. 11(a).
[47] 30 U.S.C. §§1401–1473 (1988 & Supp. IV 1992).
[48] Agreement, annex, sec. 1, para. 6(a)(i). [49] *Id.*, para. 6(a)(iii).
[50] Statement by the Special Representative of the President, Feb. 23, 1982, note 6 *supra*.
[51] Agreement, annex, sec. 1, para. 15(b).

applies to manganese nodules or any other mineral resource. If the Council fails to complete the work on time, it must give provisional approval to an application based on the Convention and the new Agreement, notwithstanding the fact that the rules and regulations have not been adopted.[52]

The Enterprise

Problem: "The treaty would give substantial competitive advantages to a supranational mining company—the Enterprise."[53] It "creates a system of privileges which discriminates against the private side of the parallel system. Rational private companies would, therefore, have little option but to enter joint ventures or other similar ventures either with the operating arm of the Authority, the Enterprise, or with developing countries. Not only would this deny the United States access to deep seabed minerals through its private companies because the private access system would be uncompetitive but, under some scenarios, the Enterprise could establish a monopoly over deep seabed mineral resources."[54]

Response: The new Agreement provides: "The obligations applicable to contractors [private miners] shall apply to the Enterprise."[55] It requires the Enterprise to conduct its initial operations through joint ventures "that accord with sound commercial principles," and delays the independent functioning of the Enterprise until the Council decides that those criteria have been met.[56] The Agreement does not exclude the Enterprise either from the principle that mining "shall take place in accordance with sound commercial principles" or from its prohibitions on subsidies.[57] It specifies that the "obligation of States Parties to fund one mine site of the Enterprise . . . shall not apply and States Parties shall be under no obligation to finance any of the operations in any mine site of the Enterprise or under its joint-venture arrangements."[58] The Agreement also eliminates mandatory transfer of technology to the Enterprise and the potentially discriminatory system for issuing production authorizations.[59]

The Agreement makes clear that a private miner may contribute the requisite "reserved area" to the Enterprise at the time the miner receives its own exclusive exploration rights to a specific area (thus minimizing its risk and investment).[60] That miner has "the right of first refusal to enter into a joint-venture arrangement with the Enterprise for exploration and exploitation of" the reserved area, and has priority rights to the reserved area if the Enterprise itself does not apply for exploration or exploitation rights to the reserved area within a specified period.[61]

Finance

Problem: "The treaty would impose large financial burdens on industrialized countries whose nationals are engaged in deep seabed mining and financial terms and conditions which would significantly increase the costs of mineral production."[62]

[52] *Id.*, para. 15(c).
[53] White House Fact Sheet, Jan. 29, 1982, note 6 *supra*.
[54] Statement by the Special Representative of the President, Feb. 23, 1982, note 6 *supra*.
[55] Agreement, annex, sec. 2, para. 4.
[56] *Id.*, para. 2.
[57] Agreement, annex, sec. 2, para. 4, sec. 6, paras. 1(a)–(c), 3.
[58] *Id.*, sec. 2, para. 3.
[59] *See* notes 32, 38 *supra*.
[60] Agreement, annex, sec. 1, para. 10.
[61] *Id.*, sec. 2, para. 5.
[62] White House Fact Sheet, Jan. 29, 1982, note 6 *supra*.

Response: The new Agreement halves the application fee for either exploration or exploitation to $250,000 (subject to refund to the extent the fee exceeds the actual costs of processing an application), and eliminates the detailed financial obligations of miners set forth in the 1982 text, including the million-dollar annual fee.[63] Financial details would be supplied, when needed, by rules, regulations and procedures adopted by the Council by consensus, on the basis of general criteria that, for example, would link the rates to those prevailing for mining on land, and prohibit discrimination or rate increases for existing contracts.[64]

With respect to state parties, in addition to eliminating any requirement that states contribute funds to finance the Enterprise or provide economic adjustment assistance to developing countries,[65] the new Agreement provides for streamlining and phasing in the organs and functions of the Authority as needed, and for minimizing costs and meetings.[66] Budgets and assessments for administrative expenses are subject to consensus procedures in the Finance Committee and approval by both the Council and the Assembly.[67]

Regulatory Burdens

Problem: "The new international organization would have discretion to interfere unreasonably with the conduct of mining operations, and it could impose potentially burdensome regulations on an infant industry."[68]

Response: The substantive changes set forth in the new Agreement, including the elimination of production limitations, production authorizations and forced transfer of technology, and the relaxation of diligence requirements, substantially narrow the area of potential abuse.[69] The new procedural provisions, including voting arrangements in the Council and the Finance Committee, and restrictions on the Assembly, decrease the risk of unreasonable regulatory decisions.[70] As indicated in its Preamble and in the General Assembly resolution adopting it, the new Agreement is the product of a marked shift, throughout the world, from statist and interventionist economic philosophies toward more market-oriented policies. Taken together, the new provisions and new attitudes give reason to expect the system to operate in accordance with the provisions of the Convention and the Agreement guaranteeing the miner exclusive rights to a mine site, security of tenure, stability of expectations and title to minerals extracted, and according the miner and its sponsoring state extensive judicial and arbitral remedies to protect those rights.[71]

What cannot be supplied in advance by any blueprint for a deep seabed mining regime is the measure of confidence born of experience with a system in operation.

[63] Agreement, annex, sec. 8, paras. 2, 3; LOS Convention, Ann. III, Art. 13, para. 2.

[64] Agreement, annex, sec. 3, para. 7, sec. 8, para. 1, sec. 9, paras. 7, 8; LOS Convention, Art. 161, para. 8(d), Art. 162, para. 2(o)(ii).

[65] Agreement, annex, sec. 2, para. 3, sec. 7, para. 1(a); *see* LOS Convention, Art. 173.

[66] Agreement, annex, sec. 1, paras. 2–5, sec. 2, paras. 1–2.

[67] *Id.*, sec. 3, paras. 4, 7, sec. 9, para. 8.

[68] White House Fact Sheet, Jan. 29, 1982, note 6 *supra.*

[69] Agreement, annex, sec. 1, para. 9; *see* notes 32, 38 *supra.*

[70] *See* notes 14, 15, 17, 22–26 *supra.*

[71] LOS Convention, Art. 153, para. 6, Arts. 187–88; Ann. III, Arts. 1, 10, 16, 18(3), 19(2), 21; Agreement, annex, sec. 1, para. 13.

Distribution of Revenues

1982 text: The Convention authorizes the equitable sharing of surplus revenues from mining, "taking into particular consideration the interests and needs of the developing States and peoples who have not attained full independence or other self-governing status."[72]

Problem: "The convention would allow funding for national liberation groups, such as the Palestine Liberation Organization and the South West Africa People's Organization."[73]

Response: Political developments in Africa and the Middle East have mitigated this problem. Moreover, distribution to such groups would be a practical impossibility unless the Sea-Bed Authority's revenues from miners and from the Enterprise exceeded both its administrative expenses and its assistance to adversely affected land-based producers, and would be possible then only if the Council decided by consensus to include such groups in the distribution of surplus revenues. A decision on distribution of surplus funds would also be subject, under the new Agreement, to a consensus in the Finance Committee.[74]

Review Conference

Problem: "A review conference would have the power to impose treaty amendments on the United States without its consent."[75]

Response: The new Agreement declares that the provisions in Part XI relating to the review conference "shall not apply."[76] Amendments to the deep seabed mining regime could not be adopted without U.S. consent.[77]

CONCLUSION

The 1994 Agreement substantially accommodates the objections of the United States and other industrial states to the deep seabed mining provisions of the Law of the Sea Convention. The Agreement embraces market-oriented policies and eliminates provisions identified as posing significant problems of principle and precedent, such as those dealing with production limitations, mandatory transfer of technology, and the review conference. It increases the influence of the United States and other industrial states in the Sea-Bed Authority, and reflects their longstanding preference for emphasizing interests, not merely numbers, in the structure and voting arrangements of international organizations. Detail that is objectionable or premature is eliminated or qualified. The Sea-Bed Authority is streamlined and its regulatory discretion curtailed. The role of its operating arm —the Enterprise—is delayed and sharply confined. Deep cuts are made in the financial obligations of states and private companies.

United States accession to the Convention and ratification of the new Agreement will promote widespread adherence by states generally. This will protect not

[72] LOS Convention, Art. 160, para. 2(f)(i), Art. 172, para. 2(o)(i).

[73] Statement by the Special Representative of the President, Aug. 12, 1982, note 6 *supra*.

[74] LOS Convention, Art. 161, para. 8(d), Art. 173; Agreement, annex, sec. 3, para. 7, sec. 9, paras. 7(f), 8.

[75] White House Fact Sheet, Jan. 29, 1982, note 6 *supra*.

[76] Agreement, annex, sec. 4.

[77] LOS Convention, Art. 161, para. 8(d), Art. 314, para. 1.

only deep seabed mining but many other important interests in the oceans.[78] In the meantime, provisional application of the Agreement by the United States and by a substantial number of other states will help ensure that Part XI will not be implemented in unmodified form, that the full range of affected interests will be represented during the early stages of organization when important precedents and procedures are established, and that these precedents and procedures will facilitate widespread ratification of the Convention and the Agreement.

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INTERNATIONAL LAW IMPLICATIONS OF THE 1994 AGREEMENT

This paper analyzes the legal implications of the Draft Resolution and Draft Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982,[1] as well as the effectiveness of the proposed arrangements under international law.

PREPARATION OF THE AGREEMENT AND THE GENERAL ASSEMBLY RESOLUTION

In July 1990, the UN Secretary-General, Javier Pérez de Cuéllar, took the initiative to convene informal consultations aimed at achieving universal participation in the Law of the Sea Convention. He noted that, in the eight years that had elapsed since the Convention was adopted, significant political and economic changes had occurred. The anticipated commercial mining of deep seabed minerals had receded into the twenty-first century; there was a strong shift toward a more market-oriented economy; and the Cold War was being replaced by a new spirit of international cooperation in resolving both political and economic problems. In 1992 the new Secretary-General, Boutros Boutros-Ghali, agreed to continue the consultations, with the assistance of UN Under-Secretary-General and Legal Counsel Carl-August Fleischhauer.

Between 1990 and 1994, fifteen meetings were held. After identifying nine issues of special concern to a group of developed countries, general agreement was reached on relatively detailed solutions to six of them, while for three of them it was thought sufficient to prepare general principles to be applied when commercial production of deep seabed minerals became imminent. After this preliminary agreement between some especially interested developed and developing states, the consultations were opened in 1992 to all United Nations member states and between seventy-five and ninety states became involved in the remaining meetings.

In 1993 attention turned to developing various procedural approaches to the form that the final document should take. Four of them were chosen for more detailed exploration:

[78] *See* John R. Stevenson & Bernard H. Oxman, *The Future of the United Nations Convention on the Law of the Sea*, 88 AJIL 488 (1994) and papers cited in note 3 thereof.

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[1] Draft Resolution and Draft Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, UN Doc. SG/LOS/CRP.1/Rev.1 (June 3, 1994) (English version of six-language text) [hereinafter Agreement].